EVUNP Holdings LLC v Fryman
2015 NY Slip Op 31840(U)
September 30, 2015
Supreme Court, New York County
Docket Number: 650841/2014
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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EVUNP HOLDINGS LLC, EVURTI LLC, and ELI VERSCHLEISER,

Plaintiffs,

- against -

JACOB FRYMAN, JFURTI LLC, SUMMER INVESTORS LLC, and WINTER 866 UN LLC,

Defendants.

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Index No.: 650841/2014
Mot. Seq. No.: 005
Motion Date: 8/6/2015

BRANSTEN, J.:

This action arises from the business dispute between Eli Verschleiser and Jacob Fryman, related to their collaboration in a business enterprise involving several entities, including a real estate investment trust and a broker-dealer entity. In Motion Sequence No. 005, Defendants seek dismissal of Plaintiffs' Complaint in its entirety. Plaintiffs filed a cross-motion seeking costs, attorneys fees', and sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1. For the reasons that follow, Defendants' motion to dismiss the Complaint is granted in part and denied in part. Plaintiffs' cross-motion for costs, attorneys' fees and sanctions is denied.

I. BACKGROUND[1]

A. The Parties' Business Relationship

Plaintiff Verschleiser and Defendant Frydman began their relevant business relationship in 2011. Verschleiser and Frydman formed various jointly owned entities in order to operate a real estate business. They created United Realty Advisor Holdings, LLC, through which they owned, managed, or advised a variety of other entities, including United Realty Trust, Inc., a public non-traded Real Estate Investment Trust (the "REIT"). In addition, Verschleiser and Frydman each owned 50% of Prime United Holdings, LLC ("PUH"), which in turn owned and managed Cabot Lodge Securities, LLC, a broker-dealer (referred to herein as the "Broker-Dealer"). (Compl. ¶ 20). The parties' relationship was governed by the Operating Agreement of United Realty Advisor Holdings, LLC (the "Operating Agreement"). Thus, through a complex network of interconnected entities (collectively referred to herein as the "Entities"), Verschleiser and Frydman ran their joint real estate business.

Verschleiser and Frydman went into business together in 2011, but by November 2013 their relationship had soured. On November 29, 2013, Defendant Frydman received notice that he was being removed from his position as manager of United Realty Advisors, LLC, and that his employment with the Entities was being terminated. (Compl. ¶ 33). Defendant Frydman immediately served Verschleiser with almost identical notices, purportedly terminating Verschleiser from his management roles in the Entities.

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[1] Unless otherwise noted, the facts described in this section are taken from the Complaint.

Id. ¶ 34. These termination notices triggered regulatory obligations requiring the REIT file an 8-K form disclosing the management dispute. Pursuant to the regulations, the REIT was required to make the public disclosure within four business days. In an effort to avoid making the 8-K disclosure, which the parties believed would harm the entities, Plaintiffs and Defendants sought to resolve their dispute by terminating the business relationship and separating their assets. Plaintiffs allege that Frydman took advantage of this time pressure to negotiate an agreement that would unfairly benefit Defendants at the expense of Verschleiser's interests.

B. The December 3, 2013 Negotiations

On December 3, 2013, Verschleiser and Frydman agreed to separate their interests in several of their joint entities. Plaintiffs allege that Verschleiser retained Martin Bell as his counsel, despite the fact that Bell had previously represented some of the joint entities. (Compl. ¶ 42). Although Bell was not physically present during the negotiations, Verschleiser alleges that he sent him attorney-client communications, including e-mails and drafts of the parties' separation agreement. Verschleiser obtained confirmation "that, for this engagement, Bell was representing the Plaintiffs exclusively, and not the Entities or Frydman." *Id.* At the conclusion of the negotiations, the parties executed a Membership Interest Sale and Purchase Agreement (the "Agreement"), which transferred Plaintiffs' ownership interests in several entities to Defendants, in exchange for fifty

percent of the economic benefit derived from the Broker-Dealer and REIT. (Compl. ¶¶ 45-46).

According to Plaintiffs, a few days after signing the Agreement Verschleiser learned that Bell and Frydman had been colluding during and after the negotiations to induce Verschleiser to enter into the agreement. Plaintiffs allege Bell and Frydman drafted an agreement that was more favorable to the Defendants.

C. Defendants' Alleged Breaches of the Agreement

Plaintiffs allege that Defendants immediately breached the Agreement in various ways. First, they claim Frydman failed to distribute certain funds received by the REIT and the Broker-Dealer, in violation of Section 6(b) of the Agreement. In order to avoid their payment obligations under the Agreement, Defendants allegedly restructured the Broker-Dealer to siphon distributions to an entity from which Plaintiffs were not entitled to payments. In addition, Frydman allegedly violated the Agreement's confidentiality provision by disclosing the terms of the Agreement to third parties. Finally, Defendants allegedly terminated an employee on January 25, 2014, despite the Agreement's provision that this specific employee be retained by the Entities until March 1, 2014.

Plaintiffs also contend that Frydman has attempted to obtain Verschleiser's confidential e-mails by re-activating accounts associated with the Entities after Verschleiser terminated the accounts. Moreover, Frydman allegedly refused to return

computer equipment that Verschleiser had loaned the Entities, despite several demands by Plaintiff for its return.

D. Frydman's Alleged Defamation of Verschleiser

According to Plaintiff, on December 19, 2013, Frydman e-mailed several employees and management personnel from the offices at 44 Wall Street, stating that Verschleiser was not employed by the entities and had no right to be on the premises, and threatening to contact the NYPD if Verschleiser did not leave the premises. Plaintiffs allege this statement was false because Verschleiser maintained his offices at 44 Wall Street, and claim that the e-mail supports Plaintiffs' defamation claim.

Plaintiffs also claim that Frydman defamed Verschleiser by making statements regarding a separate lawsuit against Defendants on December 18, 2013, which sought to compel Frydman to return outside investor funds from a failed transaction. According to Plaintiffs, Frydman was notified of the lawsuit and immediately distributed the funds at issue to the investors. On January 19, 2014, Frydman allegedly disparaged Verschleiser by emailing the employees of the Entities regarding that lawsuit, and stating that the claims made in the December 18, 2013 lawsuit were false and wrongful. Plaintiffs assert a defamation claim against Frydman because he alleges that the claims asserted in that lawsuit were neither "false" nor "wrongful."

E. The Instant Action

Plaintiffs filed this action on March 14, 2014, asserting six causes of action against defendants. Plaintiffs allege: (1) fraud in the inducement; (2) declaratory judgment; (3) defamation; (4) conversion and civil theft; (5) breach of contract; and (6) breach of the duty of good faith and fair dealing. On November 24, 2014, Defendants sought dismissal of the Complaint in its entirety pursuant to CPLR § 3211(a)(7). Plaintiffs oppose the motion, and filed a cross-motion for sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1, arguing that Defendants' motion is frivolous.

II. LEGAL STANDARD

Defendants move to dismiss the Complaint pursuant to CPLR § 3211(a)(7) for failure to state a claim upon which relief may be granted. A motion to dismiss must be denied if the factual allegations contained "within the pleadings' four corners … manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). The facts alleged in the complaint must be accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Whether a plaintiff can ultimately establish its allegations may not be considered when deciding a motion to dismiss. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). "Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *David v. Hack*, 97 A.D.3d 437, 438 (1st Dep't 2012).

III. DISCUSSION

A. Defendants' Motion to Dismiss

a. Fraud in The Inducement

Plaintiffs aver that Verschleiser hired Martin Bell to represent the Plaintiffs in the negotiation of the Separation Agreement, but that Bell and Frydman secretly colluded during and after the negotiation. Plaintiffs' fraud claim is based on Frydman's intentional misrepresentation or omission regarding the collusion with Martin Bell. Plaintiffs allege Frydman misrepresented or omitted the nature of his relationship with Bell in order to induce Plaintiff to enter into a disadvantageous Separation Agreement.

Defendants first argue that Plaintiffs fail to plead fraud with particularity, warranting dismissal of this claim. Specifically, Defendants contend that Plaintiff has failed to allege a misrepresentation or omission of material fact because (i) Martin Bell was not retained as Verschleiser's personal attorney, and (ii) the e-mails relied upon by Plaintiffs do not evince any misrepresentation and cannot support the claim because they were sent *after* the Agreement's execution. (Defs. Br. Supp. at 12-13). Plaintiffs counter that they have properly pled that Defendants colluded with Bell to fraudulently induce Verschleiser to enter into an agreement that favored Defendants.

To state a cause of action for fraud in the inducement, Plaintiff must allege (1) misrepresentation or omission of a material fact, (2) falsity, (3) scienter on the part of the wrongdoer, (4) justifiable reliance, and (5) resulting injury. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (1st Dep't 2014) (citing

Dembeck v. 220 Cent. Park S., LLC, 33 A.D.3d 491, 492 (1st Dep't 2006). Where a cause of action is based upon fraud, CPLR § 3016(b) requires that the circumstances constituting the wrong be stated in detail.

Viewing the complaint's allegations in the light most favorable to Plaintiff, the Court declines to dismiss Plaintiffs' fraud claim. First, Defendants' argument that Martin Bell did not actually represent Verschleiser during the negotiations contradicts the complaint, merely raising an issue of fact inappropriate for disposition on a motion to dismiss. *Chapman, Spira & Carson, LLC v. Helix BioPharma Corp.*, 115 A.D.3d 526, 527 (1st Dep't 2014) (stating that facts alleged in the complaint must be accepted as true on a motion pursuant to CPLR § 3211(a)(7)). Defendants' assertion that Plaintiffs "fail to allege that there was any material misrepresentation or omission by Frydman or Bell during the negotiations" is also contradicted by the Complaint, which specifically alleges that "Frydman omitted to inform Verschleiser that he was colluding with Plaintiffs' attorney." Compl. ¶ 87. Finally, Defendants' argument that the e-mails cited by Plaintiffs cannot support the fraud claim because they were sent *after* the negotiations is unpersuasive, because later communications can provide evidence of a prior relationship between Frydman and Bell. Accordingly, Defendants' motion is denied insofar as it seeks to dismiss the fraud claims.[2]

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[2] Defendants also argue that Plaintiffs fail to allege reasonable reliance. Even if the court were to consider this argument, which was improperly raised for the first time in reply papers, Defendants again merely rely on their factual contention that Bell was not actually Verschleiser's attorney. Moreover, as "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a

b. Declaratory Judgment

Defendants argue that Plaintiffs' second cause of action for a declaratory judgment should be dismissed because there is no justiciable controversy. Plaintiff seeks a declaration that the ownership of the entity known as United 866 Management, LLC was not affected by the parties' Separation Agreement. (Compl. ¶¶ 84-88). Defendants acknowledge that Plaintiff's ownership interest in United 866 Management, LLC ("United 866") was not transferred by the parties' Agreement. Nevertheless, Plaintiffs aver that Frydman "has repeated asserted, including in Court documents, that Plaintiffs transferred or assigned their interests in United 866 Management LLC to Defendants." (Compl. ¶ 87).

CPLR § 3001 permits a court to render a declaratory judgment having the effect of a final judgment regarding a "justiciable controversy." A declaratory judgment therefore "requires an actual controversy between genuine disputants" and may not be used "as a vehicle for an advisory opinion." *Long Is. Light. Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep't 2006). Courts are not "empowered to render advisory opinions, or determine abstract, moot, hypothetical, remote or academic questions." *Matter of Ideal Mut. Ins. Co.*, 174 A.D.2d 420, 421 (1st Dep't 1991). A dispute "matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights." *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d

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motion to dismiss," the Court declines to dismiss Plaintiff's fraud claim based on this argument. *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015).

774, 776 (2d Dep't 2013) (citing *Cavallo v. Davenport Neck Corp.*, 198 A.D.2d 104, 104 (1st Dep't 1993)). Here, Defendants argue that there is no justiciable controversy because it has already admitted that Plaintiffs' rights to United 866 Management LLC were not affected by the Separation Agreement. However, Plaintiffs allege that Defendants have repeatedly represented to third parties, and even to the Court, that they own United 866. Significantly, Plaintiffs point to a filing in a related case, in which Defendants asserted that Plaintiffs transferred all of their ownership interest to Defendants "in each of the Entities, *inclusive of United 866 Management, LLC.*" (Pl. Br. Opp'n at 16) (emphasis added). The Court therefore concludes that Plaintiffs have received direct notice of Defendants' challenge to their property rights. *Zwarycz*, 102 A.D.3d at 776. Accordingly, the Court concludes the Complaint raises a justiciable controversy regarding the ownership of United 866 Management LLC. *Id.*

For the foregoing reasons, that portion of Defendants' motion seeking dismissal of Plaintiffs' request for a declaratory judgment is denied.

c. Defamation

Defendants next argue that Verschleiser's cause of action for defamation must be dismissed because the statements Plaintiffs rely on to support the claim are not defamatory. Plaintiffs counter that the statements are clearly defamatory because they injured Verschleiser's business reputation and suggested that he committed serious crimes.

To state a claim for defamation, a plaintiff must assert that a defendant: (1) made a false statement; (2) published to a third party; (3) without privilege or authorization; and (4) causing harm to the plaintiff, unless the publication is of the category which is actionable regardless of harm. *Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 (1st Dep't 2014). Because the falsity of the statement is an element, the statement's veracity is an absolute defense. *Id.* (citing *Konrad v. Brown*, 91 A.D.3d 545, 546 (1st Dep't 2012)). Whether particular words are defamatory presents a legal question to be resolved by the court, which must construe the words in the context of the entire publication, tested against the understanding of the average reader. *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94 (1985).

Here, Plaintiffs base their defamation claim upon two separate e-mails sent by Defendant Frydman. First, Plaintiffs aver that Frydman sent an e-mail on January 19, 2014 to employees of the Entities regarding a lawsuit filed by Verschleiser in December 2013. (Compl. ¶ 78). Plaintiffs argue that Frydman's characterization of the lawsuit was defamatory, because Frydman stated the action asserted "false" and "wrongful" claims. The Court concludes that these statements are not actionable because they are statements of opinion. *Gotbetter v. Dow Jones & Co.*, Inc., 259 A.D.2d 335, 335 (1st Dep't 1999).

In *Gotbetter*, the Appellate Division upheld the Supreme Court's dismissal of a plaintiff's defamation claim based on a defendant's statement that a previous suit was "baseless." *Id.* at 335-36. Federal Courts applying New York law have similarly found such statements about litigation not actionable where the context would signal to an

observer that the statements are not conveying facts, but mere opinions. For example, in *Scholastic, Inc. v. Stouffer*, the court dismissed a defendant's counterclaim for defamation based on the Plaintiff's statements that claims asserted in related litigation were "meritless." 124 F. Supp. 2d 836, 850 (S.D.N.Y. 2000) (abrogation recognized, on other grounds, by *Atrium Group De Ediciones Y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F Supp. 2d 505, 507 (S.D.N.Y. 2008)). Here, similarly, the Court concludes that, in context, Frydman's statement that the lawsuits against him were "wrongful" and "false" would be understood by the average reader as a statement of opinion, and therefore such statements are not actionable. *Aronson*, 65 N.Y.2d at 593-94. Accordingly, the Court concludes that the January 29, 2014 e-mails cannot support a defamation claim.

Next, Plaintiff relies on a December 19, 2013 e-mail sent by Frydman to Verschleiser, which copied several executives employed by the Entities as well as management personnel from the offices at 44 Wall Street. This message, according to Plaintiff, stated as follows:

> "You have no position with, business with, rights with respect to, or any other relationship with United Realty or any of its affiliates. You have no right to be on the premises … Should you fail to leave the premises within the next ten minutes we will contact building security and New York City police and seek to have you arrested for trespass."

(Compl. ¶ 82).

Plaintiff avers that this statement was false because Verschleiser, who maintained his own offices in the building, had a right to be on the premises. Moreover, Plaintiff

argues that Defendants' statements constitute defamation per se because the statements impute a serious crime to Plaintiff. (Pl. Br. Opp'n at 14-15).

A statement will fall into the category of "defamation per se" when it is so noxious and injurious that the law will presume pecuniary damages and, thus, special damages need not be alleged. *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). Plaintiff correctly notes that one of the categories of "per se" defamation includes "statements … charging [a] plaintiff with a serious crime." *Martin v. Hayes*, 105 A.D.3d 1291, 1292 (3d Dep't 2013) (citing *Liberman*, 80 N.Y.2d at 434-435). However, New York law "distinguishes between *serious* and *relatively minor* offenses, and only statements regarding the former are actionable without proof of damage." *Martin*, 105 A.D.3d at 1292 (emphasis added). The Court finds *Martin* particularly instructive because there, as here, the court considered a defendant's statements charging plaintiff with "criminal trespass." *Id.* The *Martin* court reasoned that simple trespass – i.e. "knowingly enter[ing] or remain[ing] unlawfully in or upon premises" (Penal Law § 140.05) – does not constitute a "serious crime." *Martin*, 105 A.D.3d at 1292. Because this is precisely the accusation asserted in Frydman's December 19, 2013 e-mail, the Court concludes that the December 19, 2013 e-mail does not constitute defamation per se. *See Liberman*, 80 N.Y.2d at 434-435. Accordingly, the Court concludes the Complaint also fails to state a defamation claim based on Frydman's December 19, 2013 e-mail.

For the foregoing reasons, the Complaint fails to state a defamation claim, and that branch of Defendants' motion which seeks dismissal of Count Three of the Complaint (defamation) is granted.

d. Conversion and Civil Theft

Defendants next argue that Plaintiffs have failed to state a claim for conversion because (i) the Complaint fails to allege that Frydman possessed Verschleiser's e-mails *to the exclusion of Verschleiser*, and (ii) the claims as to computer equipment were specifically waived by the parties' Separation Agreement. For the reasons that follow, the Court grants Defendants' motion only with regards to Verschleiser's e-mails.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights." *State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259 (2002). A cause of action for conversion accrues "when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court." *Id.* In addition, where the original possession is lawful, a conversion does not occur "until after a demand and refusal to return the property." *D'Amico v. First Union Nat. Bank*, 285 A.D.2d 166, 172 (1st Dep't 2001).

First, Defendants correctly note that the Complaint is devoid of any assertion that Frydman wrongfully possessed e-mails and confidential information to the exclusion of Verschleiser. Moreover, Plaintiffs do not address or refute this portion of Defendants' argument in their opposition brief. Accordingly, the Court concludes that the absence of

allegations that Frydman possessed this information *to the exclusion of* Verschleiser renders that portion of the conversion claim deficient. Thus, Plaintiff's complaint fails to state a cause of action for conversion regarding e-mails or confidential information allegedly possessed by Frydman.

Next, Defendants argue that the conversion claim with regards to computer or server equipment must be dismissed because the separation agreement contained a general waiver which applies to this claim. First, to the extent that Plaintiff has pleaded a fraudulent inducement claim, the agreement may ultimately be rescinded. *Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 82 (1st Dep't 2010) (citing *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70 (1st Dep't 2002). Thus, if Plaintiff prevails on its fraud claim and its request for rescission, the agreement and its releases "may be rendered void, and the [conversion] claim revived." *Gosmile, Inc.* 81 A.D.3d at 82. Moreover, Defendants' argument that the "only servers which the Frydman parties have in their possession and control are the company servers of United Realty," (Defs. Br. Supp. at 18), merely contradicts the facts clearly asserted in the complaint, and does not support dismissal at this stage. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) ("The facts alleged in the complaint must be accepted as true …"). Accordingly, the Court cannot dismiss Plaintiffs' conversion claim to the extent the claim is asserted with regards to computer equipment Verschleiser loaned to the Entities. (Compl. ¶ 83).

For the foregoing reasons, Defendants' motion to dismiss Plaintiffs' conversion claim is granted with regards to the e-mails allegedly possessed by Defendant Frydman,

and that claim is dismissed. However, Defendants' motion to dismiss Plaintiff's conversion claim with regards to computer or server equipment is denied.

e. Breach of Contract

Next, Defendants argue that Plaintiffs' breach of contract claim must be dismissed. First, Defendants argue that Plaintiffs "cannot show [their] performance under the Separation Agreement." (Defs.' Br. Supp. at 19). Second, Defendants argue that Plaintiffs fail to allege damages caused by Defendants' alleged breach, and therefore the claim must be dismissed. Finally, Defendants challenge various factual assertions in the complaint, arguing that Plaintiff has failed to state a claim based on the complaint's allegations. For the following reasons, the Court deems all of Defendants' arguments unavailing.

To state a claim for breach of contract, a plaintiff must assert (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages. *US Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 423 (1st Dep't 2012) (citing *JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 (2d Dep't 2010)). The allegations in the Complaint must be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013; *see also Mee Direct, LLC v. Automatic Data*

Processing, Inc., 102 A.D.3d 569, 569 (1st Dep't 2013) (citing *Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dep't 2010)).

First, Defendants' argument that the breach of contract claim must be dismissed because Plaintiffs cannot establish that they performed under the agreement is unsuccessful, because it confuses the standard the Court must apply. At this stage, the Court is required to accept every allegation in the Complaint as true, and cannot consider whether Plaintiff would ultimately establish its claims at trial. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Thus, Defendants cannot win dismissal of Plaintiffs' complaint solely by making factual assertions that contradict the Complaint. Defendants contend that Verschleiser's "noncompliance [with the agreement] is sufficient to bar Plaintiffs' breach of contract claims." (Defs. Br. Supp. at 20). For example, Defendants assert that Plaintiff failed to restore certain computer servers and web hosting services pursuant to the agreement's requirements. *Id.* However, such allegations merely raise a factual dispute, which is insufficient to dismiss Plaintiffs' complaint pursuant to CPLR § 3211(a)(7). *See EBC I, Inc.*, 5 N.Y.3d at 19. Accordingly, this argument to dismiss the breach of contract claim fails.

Next, Defendants' contention that Plaintiffs have insufficiently alleged damages fails, specifically because the Complaint asserts that Plaintiff suffered "damages as a result of these breaches in an amount to be determined at trial." (Compl. ¶ 106). Moreover, while damages are an essential element of the breach of contract claim, Plaintiff correctly notes that "[s]pecific damages do not have to be stated in a complaint

so long as facts are alleged from which damages can be properly inferred." *Group Health Solutions Inc. v. Smith*, 32 Misc. 3d 1244(A), *7 (Sup Ct. N.Y. Cnty. 2011). Here, damages can properly be inferred from Plaintiffs' allegations that Defendants have failed to make certain distributions to which Plaintiffs were entitled, have breached confidentiality provisions, and fired an employee in violation of the agreement's explicit provisions. (Compl. ¶ 105).

Defendants' argument that specific breaches alleged in the complaint cannot sustain a breach of contract claim also fails because Defendants make factual, rather than legal, arguments to support dismissal. First, Defendants argue that Plaintiffs failed to allege that Defendants' entities actually received distributions which should have been subsequently transferred to Plaintiffs, and that the ownership structure of Defendants' entities was not actually changed to deprive Plaintiffs of their distributions. (Defs. Br. Supp. at 21-23). This argument does not prevail because the Complaint clearly alleges that Defendants have "distributed funds to an unauthorized account without making the requisite distribution to Plaintiffs," and that Defendants "transferred at least a twenty percent interest in the Broker-Dealer to … an entity from which Plaintiffs are *not* entitled to a distribution." (Compl. ¶¶ 66, 68) (emphasis in original). Thus, affording Plaintiffs the benefit of every favorable inference, the Complaint states a claim for breach of contract with respect to the distributions Plaintiffs were entitled to. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

Additionally, Defendants' contention that Plaintiffs do not state a claim for breach of the agreement's confidentiality provision also does not succeed because the Complaint alleges that the terms of the agreement were disclosed to numerous third parties in violation of the agreement. (Compl. ¶¶ 69-70); *see Redf-Organic Recovery, LLC v. Rainbow Disposal Co., Inc.*, 116 A.D.3d 621, 621 (1st Dep't 2014) (affirming denial of motion to dismiss where "[t]he amended complaint alleges that defendant used plaintiff's confidential information to enter into an agreement with a third party in breach of the parties' confidentiality agreement.").

Defendants' next argument that Plaintiffs do not state a claim with regards to the termination of an employee in violation of Section 21 of the agreement is similarly flawed. Defendants assert that Plaintiffs have failed to allege that they suffered any damages; as noted above, damages may properly be inferred from Plaintiffs' allegations that Defendants breached Section 21 of the Agreement by firing an employee whose employment was secured in an arms-length negotiation between sophisticated parties. *Group Health Solutions Inc.*, 32 Misc. 3d 1244(A), at *7 ("Specific damages do not have to be stated in a complaint so long as facts are alleged from which damages can be properly inferred.").

For the foregoing reasons, the Court concludes the Complaint states a claim for breach of contract, and denies Defendants' motion to dismiss that claim.

f. Breach of the Duty of Good Faith and Fair Dealing

Defendants also argue that Plaintiffs' claim for breach of the duty of good faith and fair dealing must fail because it is duplicative of Plaintiffs' breach of contract claim. Plaintiffs contend that the complaint properly states a claim for breach of the duty of good faith and fair dealing because (i) the complaint alleges that Frydman colluded with Bell to induce Plaintiff to sign the Agreement and (ii) the complaint asserts that Defendants restructured the Broker-Dealer to deprive Plaintiffs of distributions to which it was entitled.

Implicit in all New York contracts is "a covenant of good faith and fair dealing *in the course of contract performance*." *Zuckerwise v. Sorceron Inc.*, 289 A.D.2d 114, 114 (1st Dep't 2001) (emphasis added). The duty imposes a requirement that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *DMF Gramercy Enterprises, Inc. v. Lillian Troy 1999 Trust*, 123 A.D.3d 210, 215 (1st Dep't 2014). A cause of action based upon a breach of the covenant of good faith and fair dealing "requires a contractual obligation between the parties." *Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 475 (1st Dep't 2010). Thus, where a court determines that there was no contract between a plaintiff and defendant, that plaintiff cannot sustain a claim for breach of the duty of good faith and fair dealing. *Id.* Moreover, "a cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of contract."

Emmet & Co., Inc. v. Catholic Health E., 16 N.Y.S.3d 154, *9 (Sup. Ct. N.Y. Cnty. 2015) (citing *The Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004)). Accordingly, dismissal of "good faith and fair dealing" claims which are duplicative of a breach of contract claim is appropriate. *Sebastian Holdings, Inc. v. Deutsche Bank, AG.*, 108 A.D.3d 433, 434 (1st Dep't 2013).

First, the Court concludes that Plaintiffs' allegations regarding Frydman's collusion with Verschleiser's attorney cannot support a claim for breach of the duty of good faith and fair dealing. Plaintiffs assert that Frydman and Bell colluded throughout the negotiation of the agreement to induce Plaintiffs to enter into it. (Compl. ¶¶ 56,109). However, Plaintiffs' allegations are limited to Defendants' conduct *prior to* the execution of the Agreement, and do not raise any violations of the duty "in the course of contract performance," i.e., after the agreement was entered into. *Zuckerwise*, 289 A.D.2d at 114. At the time Frydman allegedly colluded with Bell, the necessary "contractual obligation between the parties" necessary to support the claim did not exist. *Duration Mun. Fund, L.P.*, 77 A.D.3d at 475. Accordingly, the Court finds that Plaintiffs fail to properly allege a claim for breach of the duty of good faith and fair dealing with regards to Frydman's collusion with Verschleiser's attorney.

Additionally, the Court determines that Plaintiffs' claim for breach of the duty of good faith and fair dealing with regards to Defendants' restructuring of the Broker-Dealer is duplicative of Plaintiffs' breach of contract claim. The alleged breach is not only "intrinsically tied to the damages allegedly resulting from a breach of contract," it is

exactly the same claim. *Emmet & Co., Inc. v. Catholic Health E.*, 16 N.Y.S.3d 154, *9 (Sup. Ct. N.Y. Cnty. 2015). Accordingly, the Court concludes that Plaintiffs' breach of the duty of good faith and fair dealing claim must be dismissed insofar as it relies on Defendants' alleged restructuring of the Broker-Dealer to deprive Plaintiffs of distributions.

For the foregoing reasons, the Court concludes that Plaintiffs' claim for breach of the duty of good faith and fair dealing, pled in the alternative as Plaintiffs' Sixth Cause of Action, must be dismissed for failure to state a claim pursuant to CPLR § 3211(a)(7).

B. Plaintiffs' Cross-Motion for Sanctions

Plaintiffs filed a notice of cross-motion (Docket No. 78) seeking costs, attorneys' fees, and sanctions against Defendants pursuant to 22 N.Y.C.R.R. § 130-1.1. Plaintiffs argue sanctions are warranted because (i) Defendants' motion to dismiss was completely without merit in law, and (ii) Defendants' motion to dismiss ignored the Court's directive not to include any affidavits in support of their motion.

A court may award sanctions against any party who engages in "frivolous conduct," which includes conduct that is "completely without merit in law" or is "undertaken primarily to delay or prolong" a lawsuit. 22 NYCRR § 130-1.1. Moreover, a Court must set forth in a written decision "the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons

why the court found the amount awarded or imposed to be appropriate." *Martinez v. Estate of Carney*, 129 A.D.3d 607, 610 (1st Dep't 2015).

Here, the Court declines to impose sanctions against Defendants, whose motion cannot be characterized as "frivolous" or entirely without merit in law, especially since part of the motion is being granted. Moreover, Defendants correctly point out that they submitted affidavits in support of their motion to dismiss pursuant to Commercial Division rules, as stated on the record on November 12, 2014. (Docket No. 63, at 8:13-14).

Accordingly, Plaintiffs' cross-motion for sanctions is denied.

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IV. CONCLUSION

Accordingly, it is hereby

ORDERED that Defendants' Motion to Dismiss is granted in part as to Plaintiffs' claims for defamation (Count 3), conversion as to e-mails (Count 4), and breach of the duty of good faith and fair dealing (Count 6), and these claims are dismissed; and it is further

ORDERED that the Motion to Dismiss is denied in part as to Plaintiffs' claims for fraud (Count 1), declaratory judgment (Count 2), conversion of computer or server equipment (Count 4), and breach of contract (Count 5), and these claims are allowed to continue; and it is further

ORDERED that Plaintiffs' cross-motion for sanctions is denied; and it is further

ORDERED that the parties are directed to appear for a status conference in Room 443, 60 Centre Street, on Tuesday, December 8, 2015 at 11:00 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 30, 2015

ENTER:

Hon. Eileen Bransten, J.S.C.